Supreme Court, U.S.
FILED
JUN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1860

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PING L. KU,

Petitioner,

v.

ALLIED-SIGNAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR ALLIED-SIGNAL, INC. IN OPPOSITION

Thomas J. Flaherty
*Donald L. Creach
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-7221

*Counsel of Record

June 15, 1989

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's determination that there was no genuine issue as to any material fact and this action was ripe for decision upon summary judgment?

2. Did the Court of Appeals err in concluding that the District Court did not abuse its discretion in determining that the status of discovery did not preclude a decision upon summary judgment?

LIST OF SUBSIDIARIES AND AFFILIATES

Respondent Allied-Signal, Inc. makes the following statement pursuant to Sup. Ct. R. 28.1. Allied-Signal, Inc. has no parent company. Allied-Signal, Inc.'s subsidiaries (except wholly owned subsidiaries) and affiliates are as follows:

Allied-General Nuclear Services
ACE, Limited
Allied Holdings (UK) Limited
Bendix HVCG Europe Limited
Ferranti-Bendix Power Generation Limited
Jurid Werke, GmbH
Ingold Electrodes, Inc.
Enscor Inc.
Sonic Oil Separation, Ltd.
Allied Automotive Ltda.
Bendix France, S.A.
Amoricaine de Fonderia-Le Chatelet, S.A.
Bendix Deutschland GmbH
Bendix Electronics, S.A.
Bendix Ricambi, S.p.A.
Cierock Ricambi, S.p.A.
Dipra Ricambi, S.p.A.
Bendix Portuguesa Sociedede de Equipamentos Automoveid, Ltda.
Bronzavia Air Equipment, S.A.
D.B.A. S.I.B.E., SNC
France Automobile Service, S.A.
Freudenberg, S.A.
Iminor, S.A.
Societe Civile Immobiliere Prieur & Cie
La Decoration Moderne, S.A.
Sifra Industries, S.A.
Societe Civile Immobiliere due 60 Av. De La Grandee Armee
TENSA, S.A.
Transpar Iberica, S.A.

Bendix Italia, S.p.A.
Bendix Altechna Freni, S.p.A.
Bendix Mexicana, S.A. de C.V.
Bendix Pemsa Cinturones de Seguridad, S.A. de C.V.
FIAAM, S.p.A.
Garrett GmbH
Garrett Productos Automotrices S.A.
Turbo Services SNC
Sistemas Bendix de Seguridad S.A. de C.V.
Allied-Signal Flight Systems Company
Kalyani Brakes Limited
Bendix Electronics Korean, Limited
Bendix Electronic Service Corporation de Espana, S.A.
Bendix Espana, S.A.
Bendix-Jidosha Kiki Corporation
Bendix Mintex Proprietary Limited
Bendix Group Superannuation Pty., Ltd.
Bunker Ramo Electronic Data Systems S.A.
Chico Corporation
Compania Industrial de Fluorita, S.A.
Compania Metalurgica de Parral, S.A.
Garrett Comtronics Licensing Corp.
Globe Auto Electricals, Ltd.
Hankuk Brake Industrial Co., Ltd.
Industrial Turbines International Inc.
International Turbine Engine Corporation
Jidosha Kiki Co., Ltd.
Kanto Seiatsu Kogyo Co., Ltd.
Tokyo Chuzsho
Leaseway All-Services, Inc.
Manbritt Industries, Inc.
Nippon Amorphous Metals Co., Ltd.
Nirlon Synthetic Fibres and Chemicals, Ltd.
Normalair Garrett (Holdings) Ltd.
Dynamic Turbocharger Services Pty., Ltd. Queensland
Asia Pacific Resin Corporation
Doosan Electro-Materials Co., Ltd.
Financiere Allied-Signal S.A.

Nittobo-Norplex/Oak Inc.
Norplex/Oak India Ltd.
Oak Mitsui Inc.
Bendix Electronics, S.A.
Prestolite of India Ltd.
Quimobasicos, S.A.
Propelentes Mexicanos, S.A.
Sifra Industrie, S.A.
Societe Anonyme des Usines Chausson [SECAN]
Societe Wheelabrator-Allevard S.A.
Sofratype, S.A.
Synektron Corporation
Union Texas Petroleum Holdings, Inc.
UOP
Nikki/Universal Co., Ltd.
UM Holdings B.V.
Serind S.p.A.
UMMS Caribbean N.V.
Ataisa S.a.c.i.
Tecpro Industrial Chemicals Ltd.
UOP Management Services (Saudi Arabia) Limited
JSR-Allied Corporation
Lucky Allied Plastics Corporation
Bendix Soehan Corporation

TABLE OF CONTENTS

Page

Questions Presented i

List of Subsidiaries and Affiliates ii

Table of Contents v

Table of Authorities vi

Statutes and Rules Involved 1

Statement of the Case 2

Argument 6

1. The Court of Appeals correctly found that the District Court did not err in determining that there was no genuine issue as to any material fact and the action was ripe for disposition upon summary judgment. 6

2. The Court of Appeals correctly found that the District Court did not abuse its discretion in determining that the status of discovery did not preclude a decision upon summary judgment. 9

Conclusion 11

Appendix A-1

TABLE OF AUTHORITIES

Cases

Page

Antonio v. Barnes, 464 F.2d 584, 585 (4th Cir. 1972) 3

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) 5, 7, 9

EEOC v. Western Electric Co., 713 F.2d 1011, 1014-15 (4th Cir. 1983) 7, 8

Gray v. Udevitz, 656 F.2d 588, 592 (10th Cir. 1981) 10

International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1272 (4th Cir. 1981) 9

Smith v. Chamber of Commerce, 645 F. Supp. 604, 608 (D.D.C. 1986) 8

Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980) 8

Walters v. Ocean Springs, 626 F.2d 1317, 1320-22 (5th Cir. 1980) 11

Statutes and Court Rules

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* 1, 2, 4

Sup. Ct. R. 17 ..... 7, 11

Fed. R. Civ. P. 56(e) 2, 3, 8, A-1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-1860

PING L. KU,

Petitioner,

v.

ALLIED-SIGNAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR ALLIED-SIGNAL, INC. IN OPPOSITION

Allied-Signal, Inc. ("Allied") respectfully requests that the Petition for Certiorari filed by Ping L. Ku ("Ku") be denied.[1]

STATUTES AND RULES INVOLVED

In the Appendix to his Petition, Ku set forth portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and portions of Fed. R. Civ. P. 56. Allied agrees that Title

---

[1] Allied concurs in Ku's description of the parties, report of the opinions and judgment below, and statement of jurisdiction. This Brief cites to the opinions below by reference to the Appendix to Ku's Petition, pages 1a to 15a.

VII and Rule 56 are involved in this case, though Allied does not agree that every portion set forth in Ku's Appendix is involved. In addition, Rule 56(e) applies to this case and is set forth as an Appendix to this Brief.

STATEMENT OF THE CASE

In 1984, Allied created a new position of Research Engineer in polymer science in the Applied Research group at its Technical Center in Petersburg, Virginia, and Allied advertised nationally for applicants. For this position, Allied was looking for someone with a substantial amount of education and experience in polymer science who would be able, with only minimal supervision, to conduct sophisticated research in the emerging technology being applied to carpet fibers. Ku applied for this position, and among the final candidates, he was the only Asian. Due to his apparently extensive background in polymer science, Ku was offered the position, and he accepted at an annual salary of $40,200. He began his employment with Allied effective February 11, 1985.

Following his weeks of orientation, Ku was given a few fairly simple assignments which would familiarize him with the nature of the work. In view of his background and the nature of the assignments, it was expected that he would complete the assignments easily and quickly and would soon be ready to take on the more complex, sophisticated projects for which he was hired. As it turned out, however, Ku took longer than was expected to complete these assignments.

During the course of 1985, as Ku was given additional assignments, he was given detailed explanations of what was expected. Ku indicated that he understood the nature of the assignments, and he provided estimates of how long the projects should take. The work he produced, however, did not indicate an understanding of the projects or the principles underlying the projects. Ku took much longer than he had estimated for the projects and much longer than the projects should take for someone with a substantial background in polymer science. In addition, he required an excessive amount of supervisory time and attention from his immediate supervisor, Charlie Cole. This not only was disappointing in view of Ku's

extensive background, but diminished the overall productivity of the group.

Ray Biron was the Director of Technical and Commercial Development, whose responsibility included the Applied Research group. During Ku's employment, Biron had numerous conversations with Cole and other managers with responsibility over Ku's work, and he learned of their dissatisfaction with Ku's performance. Biron also directly reviewed and observed Ku's work product and performance on a number of occasions.[2]

In late 1985, Allied-Signal, Inc. implemented a census/cost reduction program in which the various sectors of the corporation were to identify positions that could be eliminated without adversely affecting business operations. This program provided enhanced separation benefits to the persons whose positions were eliminated.

In connection with this program, Biron reviewed the composition of the workforce in his group and selected Ku's position as one of those to be eliminated. Biron determined that Ku's position was one of those that could be eliminated with the least adverse effect on the operation of his area. Ku's was the position most recently added to the Applied Research group, and Ku had only been in that

---

[2] In his Petition, Ku states as fact that Biron never reviewed his work. Allied provided the District Court an Affidavit from Biron stating that Biron had directly reviewed and observed Ku's work product and performance on a number of occasions. Ku submitted an Affidavit to the District Court setting forth Ku's belief that Biron never reviewed his work. To the extent Ku was describing his personal observations of Biron's actions, his Affidavit at most would raise an issue about a fact which is not material, since Biron had opportunities to review Ku's work product and performance without being observed by Ku. Ku's Affidavit went beyond his personal knowledge, however, in violation of Fed. R. Civ. P. 56(e), to state categorically that Biron did not review Ku's work product and performance. Such a statement not based on personal knowledge cannot raise a genuine issue of material fact. *See, e.g., Antonio v. Barnes*, 464 F.2d 584, 585 (4th Cir. 1972.)

Ku's Petition contains various other representations of fact which are not supported by the record or which provide only Ku's version of disputed facts. To the extent the facts were disputed, the District Court properly concluded that those facts were not material to its disposition of Allied's motion for summary judgment.

position approximately nine months. Before the position was created and Ku was hired, the group had functioned for a long time without such a position. During the period in which Ku held the position, he did not make any significant contribution to the operation of the group, so the group would not experience any significant loss if Ku were no longer in the position. In fact, Ku required so much supervisory attention due to his poor performance that removing Ku from the position was likely to improve the overall operations of the group.

On December 12, 1985, Ku was informed that his position was being eliminated as part of the census/cost reduction program. He was given a choice of types of enhanced separation benefits, and he chose to receive additional credit of five years of age and five years of service toward a pension. Adding this credit to Ku's age and his one year of service gave him sufficient credit for a 60-point pension, whereas he otherwise would not have been eligible for any pension. After his employment ended, he began receiving a pension of approximately $600 per month, which he has received continuously since then.

As was specified in the census/cost reduction program, Ku's position was completely eliminated, and he has never been replaced.

Following the end of his employment, Ku contacted the Equal Employment Opportunity Commission (EEOC). Ku was familiar with the EEOC because he had contacted the EEOC and had inquired about filing a Charge of Discrimination when a previous employer had eliminated his job. Ku was aware that he had a limited amount of time to file a Charge with the EEOC, and he called the EEOC and learned specifically what the time limit was. Nevertheless, Ku did not file a Charge until after the period had expired.

The EEOC ultimately issued a Determination that there was no reasonable cause to believe Ku's allegation of race discrimination was true. Ku thereafter filed an action in the United States District Court for the Eastern District of Virginia, Richmond Division, alleging that Allied had discriminated against him on the basis of race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in eliminating his position and terminating his employment.

In connection with the District Court action, Allied took Ku's deposition and asked Ku to state the factual basis for his belief that he was discriminated against because of his race. He responded simply that he believed he had performed well, yet was singled out for job elimination. He also indicated that he thought Ed Duffy, his second-line supervisor, was personally hostile toward him. When Ku was asked what, if anything, such supposed hostility had to do with his race, Ku responded, "Because he just hate[s] me, that's all." Ku stated that these facts provided the entire basis for his claim.

In his deposition, Ku admitted that during the meeting in which he was informed of his job elimination, there was no mention of his race, and no Allied representative has ever said anything that indicated that his race was a factor in the decision to eliminate his job. In fact, he admitted that during all of his dealings with Allied, no Allied representative ever said anything to him at all about his race. He further admitted that he did not even know who had made the decision to eliminate his job, though he speculated (incorrectly) that it was Duffy. Finally, he admitted that he did not know how his work or his qualifications compared with those of the other members of the Applied Research group, and he did not know Allied's evaluation of the other employees' work performance.

Allied filed a motion for summary judgment in the District Court, asserting that the undisputed facts established that Ku could not satisfy his burden of proof, and Allied therefore was entitled to summary judgment in its favor pursuant to *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Allied asserted that the undisputed facts established that Ku did not file a Charge with the EEOC within the required period and therefore did not satisfy the prerequisites to maintaining the action; there was no direct evidence that Allied intended to discriminate against Ku; using indirect methods of proof, Ku could not establish a *prima facie* case of discrimination because he had not been performing his job duties at a level that met Allied's legitimate expectations, he was not replaced by a person outside the group protected from discrimination, and there was no other evidence to support the inference of discrimination necessary for a *prima facie* case; and there was no evidence that Allied's articulated legitimate, nondiscriminatory reasons for eliminating Ku's job were a pretext for discrimination. Allied's motion was

based largely on Ku's deposition, but Allied also submitted the Affidavit of Ray Biron, the person who made the decision to eliminate Ku's job.

The District Court granted Allied's motion for summary judgment on the grounds that Ku had not submitted sufficient evidence to raise a *prima facie* inference of discrimination, and even if Ku could establish a *prima facie* case, there was no evidence that Allied's articulated legitimate, nondiscriminatory reasons for eliminating Ku's job were a pretext for discrimination. In view of its conclusions on these points, the District Court did not consider Allied's arguments that Ku had not filed a timely Charge of Discrimination and that Ku could not establish a *prima facie* case because he could not prove that he was satisfying Allied's legitimate expectations as to job performance.

Ku then appealed to the United States Court of Appeals for the Fourth Circuit. A panel of the Court of Appeals issued a *per curiam* opinion affirming the District Court's decision. Ku filed a petition for rehearing and suggestion for hearing en banc. No member of the Court of Appeals requested a poll on the suggestion for rehearing en banc, and the petition was denied. The instant Petition followed.

ARGUMENT

This action does not present any issues which would justify exercise of this Court's discretionary jurisdiction on a petition for certiorari. This is a routine action in which the Court of Appeals simply affirmed, without dissent, the District Court's determination that an ordinary employment discrimination action was ripe for decision upon summary judgment. The petition for certiorari accordingly should be denied.

1. THE COURT OF APPEALS CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE ACTION WAS RIPE FOR DISPOSITION UPON SUMMARY JUDGMENT.

In support of its motion for summary judgment, Allied cited the portions of Ku's deposition and the Biron Affidavit which established the undisputed facts necessary for resolution of this action. Ku now challenges the District Court's determination, as affirmed by the Court of Appeals, that there were sufficient undisputed facts to allow the action to be decided upon summary judgment.

As noted above, Allied demonstrated numerous grounds upon which the District Court should find that Ku could not prove the essential elements of his claim, so that the Court should enter summary judgment in favor of Allied pursuant to *Celotex Corp. v. Catrett*, 477 U.S. at 322-23. Among those grounds, Allied showed that there was no direct evidence of discrimination, and Ku could not rely on the indirect method of proof because he could not carry his burden of proving two of the necessary elements of a *prima facie* case of discrimination.

Where, as here, the plaintiff's employment has been terminated, the plaintiff must prove the following four elements to establish a *prima facie* case: (1) that he was in a group protected by law from discrimination; (2) that his employment was terminated; (3) that at the time his employment was terminated, he was performing his job duties at a level that met his employer's legitimate expectations; and (4) that following the termination of his employment, he was replaced by someone not in the protected group. *See, e.g., EEOC v. Western Electric Co.*, 713 F.2d 1011, 1014 (4th Cir. 1983). In its motion, Allied acknowledged that the first two elements were present, but demonstrated that Ku could not prove the third element or the fourth element.

Ku now argues that his Affidavit showed that he was, in fact, satisfying Allied's legitimate expectations. That argument does not present an issue worthy of this Court's attention and does not begin to satisfy the standard of Sup. Ct. R. 17 as to when the Court will exercise its discretion to grant a writ of certiorari.

The more fundamental flaw in Ku's argument, however, is that the District Court did not base its decision on Allied's contention that Ku could not establish the third element of the *prima facie* case, but found that Ku could not prove the fourth element. (11a). It was undisputed that Ku's position was eliminated, and he was not

replaced by anyone, either in the protected group or not. In that circumstance, to establish a *prima facie* case, the plaintiff must present some other evidence sufficient to support the necessary inference of discrimination. *See, e.g., EEOC v. Western Electric Co.*, 713 F.2d at 1014-15. The District Court found that Ku did not adduce any evidence which would support an inference of discrimination. Thus, even if Ku's argument were accepted, it would not affect the validity of the District Court's decision, as affirmed by the Court of Appeals.

Moreover, Ku's Affidavit setting forth his own opinion of his performance did not raise a genuine issue of material fact. Such a conclusory statement of opinion violates Fed. R. Civ. P. 56(e), which requires that an affidavit in opposition to a motion for summary judgment set forth specific admissible *facts* showing that there is a genuine issue for trial. Also, Ku's self-assessment is irrelevant, as a matter of law, to a determination of Allied's motivation and cannot raise a genuine issue of material fact. *See, e.g., Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980); *Smith v. Chamber of Commerce*, 645 F. Supp. 604, 608 (D.D.C. 1986). And even if it were accepted that Ku performed as well as he contends, it would remain undisputed that Ku's position was the one that could be eliminated with the least adverse effect on his group. Ku admitted in his deposition that he did not know how his work or his qualifications compared with those of the other members of the Applied Research group, and he did not know Allied's evaluation of the other employees' work performance. Thus, Allied's evidence as to the *comparative* value of Ku's work and the other employees' work was undisputed.

Finally, Ku argues that because this was an employment discrimination action, in which "motive and intent" necessarily were in issue, the District Court could not properly decide the case without taking live testimony and assessing the demeanor of the persons involved. In other words, he contends it is never possible to decide an employment discrimination case upon summary judgment. That contention cannot possibly withstand the weight of the decades of employment discrimination cases in which the courts have entered summary judgment.

The District Court acknowledged in its opinion that summary judgment must be applied sparingly in employment discrimination cases, and the District Court considered Allied's motion with the appropriate degree of caution. (8a-9a). As the District Court noted, however, the Court of Appeals for the Fourth Circuit has squarely held that such a cautious approach does not mean that summary judgment is *never* appropriate in employment discrimination cases. (8a-9a). *See, e.g., International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1272 (4th Cir. 1981).

The District Court properly concluded that the undisputed facts were sufficient to establish that Ku could not carry his burden of proving discriminatory intent. Thus, consistent with this Court's decision in *Celotex Corp. v. Catrett*, 417 U.S. at 322-23, the District Court properly concluded that summary judgment should be granted. The Court of Appeals properly affirmed this determination. There is no need for this Court to review the matter further. Certainly there is no need for this Court to devote its resources to articulating the obvious: that summary judgment is not always inappropriate in employment discrimination cases.

2. THE COURT OF APPEALS CORRECTLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE STATUS OF DISCOVERY DID NOT PRECLUDE A DECISION UPON SUMMARY JUDGMENT.

Ku's Petition substantially misrepresents the status of the discovery at the time the District Court decided Allied's motion for summary judgment. But even if Ku's representation were accurate, his complaint about the District Court's handling of discovery would not raise an issue meriting this Court's review on a writ of certiorari.

On April 16, 1988, after this action had been pending for seven months and had been continued at Plaintiff's request, the District Court issued a Pre-Trial Order which established a trial date of July 27, 1988. The Order also provided that discovery must be completed and dispositive motions must be filed by June 27, 1988.

On June 20, 1988, Allied served its timely responses to Plaintiff's Third Set of Interrogatories and Plaintiff's Third Request for Production of Documents. In accordance with the Local Rules of the Eastern District of Virginia, Allied had previously served timely objections to these requests. In its response, Allied noted that the document request sought documents containing confidential, personal information about other Allied employees and documents containing confidential, proprietary information about Allied products and processes. With its response, Allied sent Ku a draft Protective Order designed to protect the confidentiality of these documents and noted that Ku need only endorse the Order and submit it to the District Court. Ten days later, Ku returned the endorsed Protective Order to Allied's counsel, who promptly tendered it to the District Court for entry. Allied did not in any way delay entry of the Protective Order, and the Protective Order did not concern any of the issues which Ku ultimately raised in a motion to compel.

In accordance with the deadline established by the Pre-Trial Order, Allied filed its motion for summary judgment on June 22, 1988. By this time, Ku had had over nine months in which to conduct discovery, and the Pre-Trial Order would not allow him to serve any further discovery requests.

On July 19, 1988, over three weeks after the discovery cutoff and just over a week before the scheduled trial date, Ku filed a motion to compel discovery. By that point, Allied's motion for summary judgment had been pending for a month, and Ku had filed a memorandum, an affidavit, and a "summary" in response to Allied's motion. In accordance with the Pre-Trial Order, Allied had filed its list of discovery materials to be used at trial and its list of potential witnesses. In short, the case finally was on the verge of trial, after months of discovery and preparation, and Allied's motion was ripe for disposition. The District Court issued its nine-page decision on Allied's motion for summary judgment the day after Ku filed his motion to compel discovery.

In deciding that the current status of discovery did not preclude ruling on Allied's motion for summary judgment, the District Court exercised its discretion, and its decision is reviewable only for abuse of discretion. *See, e.g., Gray v. Udevitz*, 656 F.2d 588, 592 (10th

Cir. 1981); *Walters v. Ocean Springs*, 626 F.2d 1317, 1320-22 (5th Cir. 1980). Ku complained to the Court of Appeals about the District Court's exercise of this discretion, and the Court of Appeals affirmed the District Court's action. The issue does not deserve any further consideration.

The facts set forth above demonstrate that the District Court did not abuse its discretion. The District Court properly concluded that Ku had had ample opportunity to conduct discovery and that his motion to compel on virtually the eve of trial should not be allowed to delay disposition of this action.[3] But in any event, this Court should not devote its precious time and efforts to a fact-specific review of whether a District Court abused its discretion in governing the conduct of discovery and pre-trial motions. This issue, too, falls far short of the standards of Sup. Ct. R. 17 as to when a writ of certiorari should be granted.

CONCLUSION

Ku's Petition utterly fails to satisfy the standard established in Sup. Ct. R. 17 as to when this Court will exercise its discretion to grant a writ of certiorari. The decisions of the lower courts were proper and do not raise any issue which justifies this Court's review. The Petition should be denied.

Respectfully submitted,
Thomas J. Flaherty
*Donald L. Creach
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-7221

*Counsel of Record

June 15, 1989

---

[3] The motion to compel was nearly incomprehensible, and it did not raise any issues meriting further delay of this action. If it were error for the District Court not to rule on this motion before ruling on Allied's motion for summary judgment, the error would be harmless.

APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.